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No. 07-1368

IN THE

Supreme Court of the United States

DAVID PARKER; TONIA PARKER; JOSHUA PARKER; JACOB PARKER; JOSEPH ROBERT WIRTHLIN; ROBIN WIRTHLIN; JOSEPH ROBERT WIRTHLIN, JR.,

Petitioners,

v.

WILLIAM HURLEY; PAUL B. ASH; HELEN LUTTON; THOMAS R. DIAZ; OLGA GUTTAG; SCOTT BURSON; ANDRE RAVENELLE; JONI JAY; JENNIFER WOLFRUM; HEATHER KRAMER; TOWN OF LEXINGTON; THOMAS GRIFFITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the First Circuit Court of Appeals erred in affirming the dismissal of petitioners' Complaint by the District Court below, on the grounds that petitioners failed to allege sufficient facts in support of their claims of constitutional violations.

II. Whether respondents' use of books in a public elementary school depicting same-sex couples and families placed an unconstitutional burden on petitioners' rights under the Free Exercise Clause of the First Amendment and/or violated petitioners' substantive due process rights as protected under the Fourteenth Amendment.

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STATEMENT OF THE CASE

I. Statement of the Facts

Massachusetts prohibits public schools and other programs of study from discriminating against students on the basis of sex or sexual orientation. M.G.L. c. 76, § 5; 603 C.M.R. § 26.03. Following adoption of the Education Reform Act of 1993 (M.G.L. c. 71, §§ 1, *et seq.*), the Massachusetts Commissioner of Education (as directed by the Board of Education) developed academic standards and curriculum frameworks designed "to inculcate respect for the cultural, ethnic and racial diversity of the commonwealth . . . and to avoid perpetuating gender, cultural, ethnic or racial stereotypes." M.G.L. c. 69, §§ 1D & 1E; 603 C.M.R. § 26.05(1). The standards and frameworks developed by the Commissioner encourage instruction that describes "different types of families," as well as "the concepts of prejudice and discrimination," all under a Guiding Principle that celebrates the capacity of students, families and staff to work together toward the creation of a "safe and supportive environment where individual similarities and differences are acknowledged." These statewide standards do not purport to mandate the use of any particular instructional materials. Rather, they are intended as a guide to assist in the selection process. M.G.L. c. 69, § 1E; *Parker v. Hurley*, 514 F.3d 87, 91 (1st Cir. 2008); (Petitioners' Appendix [App.] A6).

In 2003, the Massachusetts Supreme Judicial Court held that a ban on same-sex marriage violates the equal protection principles of the state Constitution. *Goodridge v. Dep't of Public Health*, 440

Mass. 309, 344, 798 N.E.2d 941, 969-970 (2003). In so doing, the SJC cited (among other support) the statutory prohibition against public school discrimination (M.G.L. c. 76, § 5) as evidence of Massachusetts' "strong affirmative policy of preventing discrimination on the basis of sexual orientation." *Id.*, 440 Mass. at 341.

Petitioners, David and Tonia Parker, are the parents of Jacob and Joshua Parker. The Parkers describe themselves as "devout Judeo-Christians" (App. A8 & C8), who sincerely believe that marriage is a union between a man and a woman *only*, and "that labeling marriage to be otherwise is immoral." (App. A8 & C9).

In September 2004, the Parkers enrolled their son Jacob in kindergarten at Estabrook Elementary School ("Estabrook"), a public school in the Town of Lexington, Massachusetts. (App. C8). During his kindergarten year, Jacob brought home from school Who's in a Family?, a book of illustrations that depicts different types of families, including children with parents of different genders, children with parents of the same gender, children with parents of different races, and a single parent family. (App. A8 & C8-C9).[1] This book was one of several contained in a "Diversity Book Bag" used by Lexington school officials "to strengthen the connections among our school population and build an atmosphere of tolerance and

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[1] Both the District Court and the First Circuit considered the alleged objectionable books, by agreement of the parties, without converting respondents' Rule 12(b)(6) motion into one for summary judgment. (App. A4).

respect for cultural racial ability and family structure diversity." (App. C8-C9).

The following academic year, Jacob's first grade reading center at Estabrook included Who's in a Family? among its collection, as well as Molly's Family, a book that teaches about different kinds of families by focusing on a kindergarten student whose parents are a same-sex couple. (App. A9 & C9). The Parkers maintain that the idea or "notion" depicted in these two books – *i.e.*, "the interchangeability of male and female within a marriage construct" – interferes with their sincerely-held religious beliefs as protected under the First Amendment to the United States Constitution (App. C9-C10), and that the public school's refusal either to give them prior notice of its intent to use the books and/or to allow their son to "opt out" of that portion of the curriculum, violates their parental rights, as protected under the Due Process Clause of the Fourteenth Amendment, to raise their children in accordance with those beliefs. (App. C12-C13, & C27-C28).

Petitioners, Joseph and Robin Wirthlin, are the parents of Joey Wirthlin. The Wirthlins, like the Parkers, describe themselves as "devout Judeo-Christians." (App. A8 & C23). Among the Wirthlins' "core beliefs" is the concept that issues concerning sexual intimacy and the holy basis of matrimony are governed by the laws of the God of Abraham and should remain private within the family. Included in that concept is the belief that homosexual behavior "is immoral in that it violates God's law." (App. C24).

On March 24, 2006, while Joey Wirthlin was enrolled in the second grade at Estabrook, his teacher, the respondent, Heather Kramer, read aloud to the class a library book entitled King & King. (App. A10 & C23). As described by the First Circuit:

> This picture book tells the story of a prince, ordered by his mother to get married, who first rejects several princesses only to fall in love with another prince. A wedding scene between the two princes is depicted. The last page of the book shows the two princes kissing, but with a red heart superimposed over their mouths. (App. A10, D1-D35).

The Wirthlins assert that the theme of King & King is not one they wish to have "celebrated and affirmed" to their son "because it is in contravention of their sincerely and deeply held faith." (App. C24). Further, respondents' use of King & King allegedly intrudes upon the Wirthlins' rights "to direct the moral upbringing of their own children." (App. C24).

II. The Proceedings Below

Objecting to their children's exposure to books that reference or depict same-sex families, petitioners filed suit against respondents, the Town of Lexington and various public school officials, in the United States District Court for the District of Massachusetts ("District Court") on April 27, 2006. Petitioners' Complaint sounded in four counts. (App. C1-C34). In

Counts I and IV, petitioners sought relief for the alleged violation of their free exercise rights and substantive due process rights under 42 U.S.C. § 1983. In Counts II and III, petitioners sought relief under state law.

On August 15, 2006, respondents moved to dismiss petitioners' Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (App. A12). After hearing oral arguments, the District Court granted respondents' motion on February 23, 2007. *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007); (App. B1-B37). In so doing, the District Court dismissed petitioners' federal civil rights claims with prejudice in reliance upon the First Circuit decision of *Brown v. Hot, Sexy and Safer Prods., Inc.*, 68 F.3d 525 (1st Cir 1995), *cert. den.*, 516 U.S. 1159, 116 S.Ct. 1044 (1996). Applying a rational basis test to petitioners' free exercise and substantive due process claims, the District Court found that respondents' use of same-sex reading materials in a public school setting, as a means of teaching the subjects of diversity and tolerance, was rationally-related to the legitimate governmental interests of preparing public school students for citizenship, eradicating past prejudice and "fostering an educational environment in which gays, lesbians, and the children of same-sex parents will be able to learn well." *Parker*, 474 F. Supp. 2d at 275; (App. B28-B30). The District Court also dismissed petitioners' state law claims without prejudice to be refiled, if petitioners desired, in state court. (App. A12). Petitioners appealed this decision to the First Circuit.

On January 31, 2008, the First Circuit upheld the dismissal below, "albeit on grounds different from the district court's reasoning." (App. A13). Specifically, the First Circuit declined to measure the challenged governmental action (respondents' use of same-sex reading materials in a public school) under *any* test – whether rational basis, compelling interest, or something in between – for the simple reason that petitioners failed to allege a burden on their constitutional rights. In other words, petitioners did not adequately plead a constitutional violation. Hence, the First Circuit regarded the appropriate level of justification for governmental action as "irrelevant." (App. A22).

In reaching its decision, the First Circuit did not apply a so-called "hybrid rights" analysis as urged by petitioners. Relying instead on *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526 (1972), as interpreted and preserved in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990), the First Circuit considered petitioners' free exercise and due process claims "inter-dependently." (App. A21). The two interests, explained the Court, "overlap and inform each other, and thus are sensibly considered together." (App. A21). Accepting the allegations of their Complaint as true (as required under *Bell Atlantic Corp. v. Twombly*, __ U.S. __, 127 S.Ct. 1955, 1965 (2007)), the First Circuit considered petitioners' free exercise and substantive due process claims in tandem. The First Circuit concluded, however, that petitioners "do not allege facts that give rise to claims of a constitutional magnitude . . .." (App. A39). They made no showing of a coercive effect, whether direct or indirect, on their

free exercise of religion. (App. A35-A38). Nor did they identify a substantive due process right so broad that it encompassed the rights of parents to dictate the scope of their children's public school education. (App. A29-A30). Without pleading rights of constitutional dimensions, the petitioners, ruled the First Circuit, "are not entitled to a federal judicial remedy under the U.S. Constitution." (App. A40). Instead, petitioners' recourse for change is to pursue "the normal political processes . . . in the town and state." (App. A40). The First Circuit accordingly affirmed the dismissal below.

REASONS FOR DENYING THE PETITION

I. THERE IS NO SPLIT AMONG THE CIRCUITS AS TO WHETHER PARENTS LEAVE THEIR *MEYER-PIERCE* RIGHTS AT THE SCHOOLHOUSE DOOR; EVEN IF THERE IS SUCH A SPLIT, IT IS IMMATERIAL TO THE FIRST CIRCUIT DECISION BELOW.

Petitioners rely on *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925), as support for their Fourteenth Amendment substantive due process claims. In *Meyer*, the Supreme Court struck down a state statute prohibiting the instruction of foreign languages in any school on the grounds it unreasonably infringed upon the liberty interest of a parent "to give his children education suitable to their station in life . . .." *Meyer*, 262 U.S. at 400, 43 S.Ct. 625. In *Pierce*, the Supreme Court held unconstitutional a state statute that required

compulsory attendance at public schools, thereby outlawing parochial and private educational institutions. The statute, ruled the Court, unreasonably interfered with the liberty interests of parents and guardians "to direct the upbringing and education of children under their control." *Pierce*, 268 U.S. at 534-35, 45 S.Ct. 571. The Supreme Court later relied on *Meyer* and *Pierce* to invalidate a compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to public school. *Yoder,* 406 U.S. at 232-33, 92 S.Ct. 1526.

The above school cases "evince the principle that the state cannot prevent parents from choosing a specific educational program . . .."

> That is, the state does not have the power to "standardize its children" or "foster a homogenous people" by completely foreclosing the opportunity of individuals and groups to choose a different path of education.

Brown, 68 F.3d at 533, citing *Meyer*, 262 U.S. at 402, 43 S.Ct. 625. *Meyer* and *Pierce* do not, therefore, support petitioners' insistence that parents may selectively shield their children from exposure to certain books or materials that may be used in public school, but which the parents find objectionable. *Pierce* lends "no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society . . .." *Yoder*, 406 U.S. at 239, 92 S.Ct. 1526 (White, J., concurring). Indeed, the First Circuit described as

"well recognized" the general proposition that, "while parents can choose between public and private schools, they do not have a constitutional right to 'direct *how* a public school teaches their child.'" (App. A28, citing *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)).

In support of an argument that their *Meyer-Pierce* rights are broader than the First Circuit recognized, petitioners claim that the Third Circuit's opinion in *C.N. v. Ridgewood Bd. of Ed.*, 430 F.3d 159 (3rd Cir. 2005), illustrates a split with the Ninth Circuit's opinion in *Fields v. Palmdale School Dist.*, 427 F.3d 1197 (9th Cir. 2005), amended by 447 F.3d 1187 (9th Cir. 2006) (*en banc*), *cert. den.*, 127 S.Ct. 725 (2006). That split, petitioners claim, is evidenced by the following footnote in *C.N.*:

> [W]e do not hold, as did the panel in *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005), that the right of parents under the *Meyer-Pierce* rubric "does not extend beyond the threshold of the school door." *Id.* at 1207. Nor do we endorse the categorical approach to this right taken by the *Fields* court, wherein it appears that a claim grounded in *Meyer-Pierce* will now trigger only an inquiry into whether or not the parent chose to send their child to public school and, if so, then the claim will fail.

C.N, 430 F.3d at 185, n.26; (Petition for Writ of Certiorari [Petition], at 7-8).

A petition for a writ of certiorari will only be granted for compelling reasons. One such reason may be that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . .." Sup. Ct. R. 10(a). For the reasons discussed below, petitioners' argument – *i.e.*, that this Court should grant a writ of certiorari to the First Circuit because of a perceived conflict between two decisions of the Third and Ninth Circuits – must fail.

A. No Conflict Exists Between the Third and Ninth Circuits.

Despite petitioners' assertions, the *C.N.* and *Fields* decisions are reconcilable. Both cases involve the substantive due process rights of privacy and to direct the upbringing of one's children in the context of surveys conducted of public school students. Moreover, in both cases, the Circuit Courts, following the principles enunciated in *Meyer* and *Pierce,* upheld the right of a public school to conduct a student survey over the objections of parents. See *C.N.*, 430 F.3d at 185 (administration of survey to seventh through twelfth grade students regarding "sensitive topics" held not an unconstitutional intrusion on parental decision-making authority);[2] *Fields*, 427 F.3d at 1206-

[2] The survey, entitled "Profiles of Student Life: Attitudes and Behaviors," was administered in the Ridgewood public school district in New Jersey. "The survey sought information about students' drug and alcohol use, sexual activity, experience of physical violence, attempts at suicide, personal associations and relationships (including the parental relationship), and views on matters of public interest." *C.N.*, 430 F.3d at 161.

1207 (providing sexual information to elementary school children held not a violation of parents' constitutional rights to direct upbringing of their children).

The Third and Ninth Circuits' interpretations of *Meyer* and *Pierce* are mirrored in numerous other Circuit decisions, including those of the First Circuit. See *Brown*, 68 F.3d at 534 (" . . . the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools"); *Leebaert v. Harrington*, 332 F.3d 134, 141 (2nd Cir. 2003) (upholding middle school's refusal to exempt seventh-grade student from mandatory health education course); *Littlefield v. Forney Ind. School Dist.*, 268 F.3d 275, 289 (5th Cir. 2001) (enforcement of mandatory school uniform policy upheld against challenge that it violated "fundamental right of filiation and companionship with one's children"); *Blau*, 401 F.3d at 393-394 (upholding middle school's refusal to exempt twelve-year old student from mandatory dress code); *Swanson v. Guthrie Ind. School Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) ("parents have a constitutional right to direct [their daughter's] education, up to a point"). See also *Myers v. Loudoun Cty. School Bd.*, 251 F. Supp. 2d 1262, 1275-76 (E.D.Va. 2003), *aff'd*, 418 F.3d 395 (4th Cir. 2005) ("[t]he fundamental right to raise one's children as one sees fit is not broad enough to encompass the right to re-draft a public school curriculum.")

Arguably, the Ninth Circuit's statement that "the *Meyer-Pierce* right does not extend beyond the threshold of the school door" can be viewed as

intemperate if interpreted to mean that parents lose *all* rights once their children enter public school. (Petition, at 7). But that construction is neither warranted nor justified by the Ninth Circuit's ruling. Whatever the parameters of parents' substantive due process rights, the *Fields* decision stands for the proposition that they do not encompass the right "to override the determinations of public schools as to the information to which their children will be exposed while enrolled as students." *Fields*, 427 F.3d at 1200.[3] The Third and Ninth Circuits are in complete agreement on this point. In fact, the First Circuit cited both the Third and Ninth Circuits in support of its decision to affirm the dismissal of petitioners' Complaint. (App. A28-A29). No conflict between the Third and Ninth Circuits warrants Supreme Court review.

If the *Fields* decision did indeed signal a departure from pre-existing constitutional case law, as petitioners suggest, the Supreme Court had an

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[3] The Ninth Circuit subsequently clarified its ruling after a rehearing *en banc*. The issue before the Court was not whether parents have *no* substantive due process rights in the public schools, but whether such rights – however defined – permit parents to limit or restrict the *information* provided to their children in public school. The *Fields* Court ruled they do not.

> Our opinion holds in essence that the Constitution does not afford parents a substantive due process or privacy right to control through the federal courts the information that public schools make available to their children. What information schools provide is a matter for the school boards, not the courts to decide.

Fields, 447 F.3d at 1190.

opportunity to correct that deviation when the parents in *Fields* filed a petition for a writ of certiorari with this Court. Yet, the Supreme Court declined to grant that petition. Without presuming to assign undue weight to that denial, it can, at the very least, lend no support to petitioners' argument that a conflict exists between the Third and Ninth Circuits on the same important matter. And, at the most, this Court's denial of certiorari in *Fields* coincides with respondents' view that the Third and Ninth Circuits are in alignment.

B. Even if a Conflict Exists Between the Third and Ninth Circuits, Such Conflict was Immaterial to the First Circuit Decision Below.

Tellingly, with respect to the scope of parents' *Meyer-Pierce* due process rights, petitioners do not argue that the First Circuit's decision contributed to or reflects the perceived conflict among the Circuits, or that such conflict influenced, in any way whatsoever, the First Circuit's decision to affirm the dismissal of petitioners' Complaint. As set forth above, the First Circuit cited *Fields* and *C.N.* as two cases standing for the same proposition – *i.e.*, that parents do not have a constitutional right to direct how a public school may teach their children. (App. A28-A29). The First Circuit then applied *Meyer-Pierce* to hold that the Parkers and Wirthlins lack the constitutional right to direct their children's public schooling by controlling the content of the reading materials to which their children are exposed. The First Circuit analysis is consistent with the analysis employed by both the Ninth and Third

Circuits in *Fields* and *C.N.*, respectively, and is entirely appropriate.

The First Circuit did not hold that parents leave their *Meyer-Pierce* rights at the schoolhouse door, as that issue was never reached. In fact, the First Circuit made no mention of petitioners' overly-broad interpretation of *Fields*. Even if the Ninth Circuit is of the opinion that parents relinquish all substantive due process rights at the schoolhouse door (a gross misinterpretation of *Fields*), such an opinion has nothing to do with this case. Therefore, issuing a writ of certiorari to the First Circuit based on the alleged split between *Fields'* limitation on parental substantive due process rights and *C.N.'s* disapproval of that limitation would be futile.

II. PETITIONERS DO NOT PRESENT A HYBRID RIGHTS CASE.

Petitioners further argue that the Supreme Court should grant a writ of certiorari in order to resolve a split among the Circuits regarding the so-called "hybrid rights" doctrine, which can be traced to *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990); (Petition, at 25-28). In *Smith*, the Court acknowledged that the case before it did not involve "the Free Exercise Clause in conjunction with other constitutional protections . . . " and, in that way, was unlike several earlier decisions including, but not limited to, *Pierce* and *Yoder*. *Smith*, 494 U.S. at 881 & n.1. In so noting, the *Smith* Court hinted (but did not hold) that such "hybrid" situations might merit a higher level of

scrutiny than rational basis review. *Id.*, 494 U.S. at 882, 110 S.Ct. 1595.[4] Petitioners contend that they specifically pled a "hybrid rights" case in their Complaint by asserting "that their right to avoid moral and religious indoctrination of their very young children stems from a combination of due process rights enunciated in the Free Exercise clause, the fundamental right of parents to raise their children, and the rights of privacy related to intimate family associations." (Petition, at 25). Thus, based on the apparently enormous controversy generated by the "hybrid rights" doctrine, and the decisions citing and discussing its application, petitioners urge the Supreme Court to use this opportunity to "explain" the doctrine and resolve a split among the Circuits. (Petition, at 25-27).

Even if the Supreme Court should someday choose to clarify the meaning of the "hybrid rights" exception, this is not the case in which to do so. In their Complaint, petitioners pled neither a free exercise claim *nor* a substantive due process claim, let alone a combination of the two. While noting the ongoing debate over the meaning and application of "hybrid rights" in terms of its status as a separate doctrine, the requisite strength of the companion right, and the level of scrutiny to be applied to the combination, the First Circuit found no need to join the fray in order to analyze petitioners' claims. (App. A18-

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[4] The First Circuit pointed out, however, that "[n]o published circuit court opinion . . . has ever applied strict scrutiny to a case in which plaintiffs argued they had presented a hybrid claim." (App. A20). Such unanimity augurs against granting Supreme Court review here.

A22). *Yoder* survived *Smith*; that much is certain. (App. A20-A21). Thus, when the interests of parenthood are joined with a free exercise claim, it is appropriate, reasoned the First Circuit, to "approach the parents' claims as the Court did in *Yoder*" – *i.e.*, "interdependently." (App. A21). Petitioners do not quarrel with this logic but, nonetheless, urge this Court to grant certiorari so that it may "reiterate *Yoder's* vitality in a [post-*Smith*] world . . .." (Petition, at 23).

The First Circuit began its analysis of petitioners' interdependent rights by declining to apply *Smith's* rationality test. If petitioners' free exercise rights are subjected to a mere rationality test, then "this case," explained the First Circuit, "would easily be dismissed." (App. A14). Yet, *Smith's* "neutral" and "generally applicable" standard applies only where the challenged regulation or law either criminalizes certain conduct or requires respondents to take the actions that they took. (App. A18). Neither circumstance is present here. Nor did respondents' use of same-sex books in the classroom target religious groups, thereby requiring proof of a compelling justification. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546, 113 S.Ct. 2217 (1993); (App. A16).

The First Circuit went on to point out that, regardless of the test employed, *Smith* did not alter the standard constitutional threshold question when considering a free exercise claim: "whether the plaintiff's free exercise is interfered with at all." (App. A22). The Court then proceeded to answer that question in the negative. "In this case there is no

pleading of a constitutionally significant burden on plaintiffs' rights." (App. A23). Once again, petitioners' Complaint contained insufficient facts to demonstrate a burden, either through coercion or compulsion, on their free exercise of religion. (App. A38-A39).

With respect to petitioners' mutually dependent due process rights, the First Circuit found "substantial differences" between the claims of the Parkers and Wirthlins and the claims of the Amish parents in *Yoder*. (App. A24). Petitioners do not live in a largely separate culture. Exposure of their children to same-sex reading materials will not automatically and irreversibly prevent them from raising their children in the religious belief that gay marriage is immoral. Further, no criminal or other sanction prevents petitioners from educating their children as they see fit. Finally, whereas the Parkers and Wirthlins still retained options, the Amish parents were left with none. (App. A24). Citing the limitations of the *Meyer-Pierce* cases (which fail to recognize a constitutional right to "direct how a public school teaches their child" (App. A28)), as well as the irrelevance of their alleged familial privacy rights (which protect the rights to marry and procreate), the First Circuit rejected petitioners' substantive due process claims. "In sum, the substantive due process clause by itself, either in its parental control or its privacy focus, does not give plaintiffs the degree of control over their children's education that their requested relief seeks." (App. A30).

Whether viewed alone or "interdependently," petitioners' rights did not rise to a level of constitutional significance. The Parkers and Wirthlins did

not, as they maintain, plead the "quintessential" hybrid rights case. Without pleading either a free exercise claim or another constitutional protection, petitioners invoked no "combination" of rights to be tested under whatever constitutional analysis the language in *Smith* requires. The petition for a writ of certiorari should be denied.

III. THE FIRST CIRCUIT DID NOT ENGAGE IN IMPROPER FACT-FINDING.

As set forth in Supreme Court Rule 10:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Apparently regarding their case as one that falls into this "rare" category, petitioners argue that the First Circuit erred by ruling "as a matter of law [that] there was no evidence of indoctrination." (Petition, at 13). This ruling, petitioners complain, was "plain error" in that it runs afoul of the rules of notice pleading as permitted under Fed. R. Civ. P. 8.

Petitioners are mistaken. The First Circuit expressly cited petitioners' allegations that respondents are "systematically indoctrinating the Parkers' and the Wirthlins' young children contrary to the parents' religious beliefs and that the [respondents] held a 'specific intention to denigrate the [families'] sincere and deeply-held faith.'" (App. A10-A11). The

First Circuit then properly recognized that, on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), petitioners' factual allegations "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true." (App. A13, citing *Bell Atlantic Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007)). Petitioners do not dispute this as an accurate statement of the law.

The First Circuit then considered whether the allegations thus pled, if taken as true, were sufficient to raise petitioners' right to relief under the Free Exercise Clause of the United States Constitution. The Court concluded they were not. (App. A39). Specifically, the First Circuit focused on the need for petitioners to allege some form of governmental coercion – either a direct interference with their religious beliefs, or a compulsion in the form of a punishment for their religious beliefs. (App. A31-A35).

> The Free Exercise Clause, importantly, is not a general protection of religion or religious belief. It has a more limited reach of protecting the free exercise of religion. . . .. Specifically, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."

(App. A31-A32, quoting *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 223, 83 S.Ct. 1560 (1963)). Applying this standard to the Complaint, the First Circuit concluded that petitioners did not

allege sufficient coercion, either in the form of direct interference with their religious beliefs, or a denial of benefits. (App. A35).

Focusing specifically on petitioners' claims of "indoctrination," the First Circuit rejected petitioners' conclusory statements that "indoctrination" necessarily amounts to unconstitutional coercion. And, even assuming (without deciding) that "*extreme* indoctrination" can be a form of coercion, the Court found inadequate facts in petitioners' Complaint to support such a claim against respondents. (App. A36) (emphasis added).

The First Circuit did not engage in improper fact-finding. Rather, it viewed the facts pled by petitioners as insufficient to raise claims of a constitutional magnitude. The petition for a writ of certiorari should be denied.

CONCLUSION

Petitioners have failed to satisfy the criteria for the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit. Respondents respectfully request that the Parkers' and Wirthlins' petition be denied.

Respectfully submitted,

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